Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1204

JEANNINE HONICKER,

Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Joel Kachinsky
Counsel for petitioner
FARM LEGAL
156 Drakes Lane
Summertown, TN 38483

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The petitioner, JEANNINE HONICKER, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the District of Columbia rendered in these proceedings on December 21, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp.28-32. The letter of August 30, 1978, of the Nuclear Regulatory Commission, is unreported, and appears at Appendix B, *infra*, pp.33-34. The letter of September 7, 1978, of the Nuclear Regulatory Commission, is unreported, and appears at Appendix C, *infra*, pp.35-37. The letter of December 6, 1978, is unreported, and appears at Appendix D, *infra*, pp.38-40. The Court of Appeals for the District of Columbia denied petition for rehearing without opinion on January 22, 1979.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1978 and January 19, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The petitioner brought suit under the Atomic Energy Act, the Energy Reorganization Act, and the Administrative Procedure Act to halt the loss of lives among U.S. citizens and foreign nationals and to protect her own health from ionizing radiation being released from the nuclear fuel cycle. The questions which arise upon dismissal of her *Petition to Review* and the denial of her *Petition for Rehearing* are:

1. Whether a *prima facie* showing of avoidable loss of life is sufficient to constitute an emergency requiring immediate action by a regulatory agency or the courts.

2. Whether any remedy is available to a private citizen to prevent immediate damage from licensed atomic facilities.

3. Whether a federal agency may, in the exercise of its discretion, violate the rights, privileges, and immunities of a citizen of the United States.

4. Whether a letter from the Secretary of the Nuclear Regulatory Commission which denies emergency relief is sufficient to constitute a final order in the context of 28 U.S.C. § 2342 (4) and 42 U.S.C. § 2239 (b).

5. Whether sound public policy may permit governmental or non-governmental agencies to deprive human beings of their lives in order to obtain energy for other human beings.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set out in Appendix E, *infra*, p. 41. The provisions involved are the following:

Constitution of the United States, Amendment IV

Constitution of the United States, Amendment V

Constitution of the United States, Amendment IX

STATUTES INVOLVED

The statutes involved are set out in Appendix F, *infra*, pp.42-48. The statutes involved are the following:

5 U.S.C. § 706
28 U.S.C. §§ 1254, 1331, 1361, 2342
42 U.S.C. §§ 1983, 2011, 2012, 2233, 2236, 2239

10 C.F.R. §§ 2.204, 2.206, 2.802, 50.100, 50.54

STATEMENT OF FACTS

The Atomic Energy Act declared the production of fissionable material to be a government monopoly. Subsequent amendments provided for limited licensing. From 1976 through 1978, the Nuclear Regulatory Commission caused to be published a number of estimates as to civilian casualties from the designed release of radiation from licensed facilities.

On July 29, 1978, the Petitioner filed with the Commission a request for emergency and remedial action, invoked her constitutional rights, and asked that a shutdown procedure commence within 30 days. The Petition charged that the licensed activity which resulted in loss of life and rights without due process was in violation of the U.S. Constitution and failed to assure adequate protection of the public health and safety in violation of 42 U.S.C. § 2011 *et seq.* The NRC is considering other aspects of the *Petition* pursuant to 10 C.F.R. §§ 2.206 and 2.802.

On September 6, 1978, petitioner filed a complaint and application for a temporary restraining order with the United States District Court for the Middle District of Tennessee, Nashville Division, seeking an injunction to preserve her civil rights and invoking 42 U.S.C. § 1983; 28 U.S.C. §§ 1331 and 1361; and the equitable jurisdiction of the U.S. District Court. Following denial of the application for a temporary restraining order, petitioner applied for extraordinary writs to the

U.S. Court of Appeals for the Sixth District and on September 14, 1978, to Justice Potter Stewart of the U.S. Supreme Court. All applications *ex parte* were denied.

On September 7, the Commission notified the petitioner by letter that emergency action was not warranted. On September 29, the Commission moved to dismiss the complaint in District Court on the grounds that jurisdiction lay with the Court of Appeals.

On November 6, Petitioner filed for review with the U.S. Court of Appeals for the District of Columbia. Her petition was dismissed *sua sponte* by the Court on December 21.

On January 8, 1979, Attorneys for the Commission filed the Court of Appeals opinion with the U.S. District Court in Nashville alleging,

> The D.C. Circuit's "jurisdictional" holding is in essence a ruling that no federal court would have jurisdiction to review the Commission's denial of emergency relief.

and

> In short, the D.C. Circuit has not ruled that jurisdiction over the denial of emergency relief is lodged in federal court. Rather, it has decided that the NRC's response is not judicially reviewable.

On January 12, 1979, the District Court dismissed the Petitioner's complaint for lack of jurisdiction of the subject matter.

On January 18, 1979, the Petitioner filed for rehearing with the U.S. Court of Appeals for the District of Columbia. The petition for rehearing was denied on January 22, 1979.

REASONS FOR GRANTING THE WRIT

1. The finality of the agency's action and the decisions of the courts below leave the wrongs complained of to be without an adequate course of remedy.

This Court has held that the finality of an agency's decision is a factor to be considered in determining whether agency action is ripe for judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). According to the Court, agency action cannot be considered final until administrative decisionmaking has reached a stage where (1) judicial review will not disrupt the orderly process of adjudication and (2) rights or obligations have been determined or legal consequences will flow from the agency action. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed. 2d 203 (1970). Determinations of finality, the Supreme Court has said, should be based on a "pragmatic" and "flexible" approach. *Abbott Laboratories v. Gardner, supra*, at 149, 150. In *Abbott Laboratories*, the Court established guidelines, stating that an agency decision which is "promulgated in a formal manner," which is

"definitive," which is not "the ruling of a subordinate official ... or tentative," and with which the agency expects compliance, is a final decision. *Ibid.*, at 151.

The deaths which have occurred in the interim, if the NRC's own figures are to believed, are certainly final. It is incorrect to say that a denial of emergency considerations, with deaths resulting from the delay in consideration, is not a "final order." Petitioner is obliged to remain in jeopardy.

The letter of the Secretary of the Commission represents a denial of the petitioner's rights to life and personal security. Her security can only be guaranteed through swift action to protect her rights when they are threatened.

A legal relationship is fixed between the Commission and the petitioner: given the facts established in the *Petition for Emergency and Remedial Action*, failure of the courts to review the order of the Nuclear Regulatory Commission establishes the Commission as an unchecked tortfeasor, and petitioner a powerless victim with no recourse until the tortfeasor itself decides to institute proceedings.

The dismissal of the *Petition to Review* in the Court of Appeals deprived petitioner of any emergency legal recourse; a writ of *certiorari* would reopen the door.

No artifact of present science is able to establish conclusively the single event which initiates a single cancer occurring within the general population. Similarly, it is impossible to establish the cause of single birth defects or other health effects which have occurred since time immemorial from a variety of causes. Since conclusive proof on an individual case is

unavailable, any suit for damages under most tort theories would be futile. Yet to say that specific proof of damage to individuals is unavailable is not to say that damages are not occurring, or that they are not detectable within the population as a whole. It is because the methods of epidemiological science are now sufficiently exact to indicate causality that the Nuclear Regulatory Commission was compelled to publish its figures. Laboratory, animal, and human experiments have demonstrated beyond any doubt that radiation causes damage to biological systems. Given sufficient amounts of radiation emissions, biological damage can be both predicted and detected in the general population.

Relying on equity to suffer no wrong to be without a remedy, petitioner has pursued every course of redress available to her. On July 28, 1978, petitioner asked the Nuclear Regulatory Commission to take emergency action to stop the harm being wrought and to protect her civil rights. Her *Petition for Emergency and Remedial Action* was one of the means designed by Congress and the federal agency to address emergency situations of the present nature where the public health is threatened. *See* 42 U.S.C. §§ 2011, 2012, 2233, 2236; 10 C.F.R. §§ 2.206, 50.54, 50.100; 43 Fed. Register 15613.

The Nuclear Regulatory Commission is fully authorized to protect the public health by initiation of the emergency relief upon any showing that health or safety are in danger, without procedural delay. *See* 10 C.F.R. § 2.204.

What constitutes an adequate remedy at law depends

on the facts of each case. *Harris Stanley Coal & Land Co. v. Chesapeake & Ohio Ry. Co.*, 154 F.2d 450 (C.C.A. 6th, 1946), *cert. denied*, 329 U.S. 761, 67 S.Ct. 111, 91 L.Ed. 656. One formula used is that an adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as a remedy in equity by injunction. *Local Union 499 I.B.E.W., AFL-CIO v. Iowa Power and Light Co.*, 224 F.Supp. 731, 938 (D.C. Iowa, 1964), cited in Wright and Miller, *Federal Practice and Procedure:* Civil § 2944.

2. An emergency situation exists which requires free access to a court of law.

In its letter which is the subject of this petition, the Nuclear Regulatory Commission cited a lack of a clear demonstration of need for emergency action.

Black's Law Dictionary defines "emergency" as a "sudden unexpected happening; an unforeseen occurrence or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity."

In the *Petition for Emergency and Remedial Action*, it was clearly demonstrated that deaths were occurring from operation of the nuclear fuel cycle. These deaths should be adequate grounds for declaring an emergency which must be mitigated to the fullest extent at the earliest possible opportunity.

From the mill tailings which result when uranium is extracted from ore, the deaths from poisonous radon

gas given off from the tailings run into the hundreds of thousands. On page 42 of the *Petition*, it is pointed out:

> In 1977, Kepford testified in the matter of the Three Mile Island Unit 2 (Docket 50-320) Operating License hearings--and was supported in his numerical calculations by the concurrence of the NRC staff--that the uranium mill tailings factor incorporated in present regulations (10 C.F.R.) was underestimated by several orders of magnitude in calculating health effects over hazard life. The central error came in failure to base the radiobiological impact on the active life of the piles, rather estimating only the impact over the life of the mine.
>
> This position propounded by Kepford has been supported by the September 21, 1977 memorandum to James R. Yore, Chairman, Atomic Safety and Licensing Board Panel (ASLBP), Nuclear Regulatory Commission, from Dr. Walter H. Jordan, ASLBP, NRC. Dr. Jordan, past assistant director of Oak Ridge National Laboratory, informed the ASLBP that the Code of Federal Regulations Table S-3, giving fuel cycle release values, was low by a factor of 100,000. Dr. Jordan told Chairman Yore that the revision would increase by hundreds the deaths to be expected from the mill stage, per yearly reactor fuel requirement, *assuming optimum management of the tailings*. Dr. Jordan subsequently refined this figure to 400 additional deaths per reactor fuel requirement per year from mill tailings. At the present time

this figure indicates that the loss of life among future citizens from each year's commitment to the fuel cycle is 28,000 from the mill tailings alone. By the year 2000, the *annual* commitment will have become, by this Nuclear Regulatory Commission estimate, 200,000 deaths to future citizens.

In the long term, deaths from radon gas are estimated in the millions. Lochstet, using NRC figures for his assumptions, calculated that 52,000,000 additional cancer deaths would be caused from radon alone, over the next 85,000 years.

In discussing other gaseous releases from the nuclear fuel cycle, the *Petition* points out on page 62:

> Carbon-14, for all the short time the Nuclear Regulatory Commission has acknowledged its importance, is now recognized as one of the most potentially harmful effluents of the fuel cycle. Because of its long half-life, it represents potential dose commitments for hundreds of thousands of years. Because it closely resembles carbon--a staff of life to biological organisms--it travels easily through the food chain and through the atmosphere to man. It travels equally easily through the human body and is not barred by the placental barrier from reaching the developing fetus. C-14 may therefore be passed on for generations *within the human body.*
>
> Here we have an example of an extremely lethal and persistent carcinogen and mutagen which is being created, being released, being absorbed by humans, and causing its harmful effects for thousands of years with no control technology yet in existence.
>
> According to EPA, C-14 from the fuel cycle has already caused about 1,000 health effects. By 2000, this commitment may have reached 10,000 health effects.

In discussing radioactive materials which are Missing Unaccounted For, the *Petition* said on page 50:

> One other escape of radioactive materials from enrichment facilities is occurring right through the doors of the plant. This is the material designated 'Materials Unaccounted For' (MUF). Charles Thornton, former AEC Director of Nuclear Materials Safeguards, who was on the Manhattan Project and was designer of the Oak Ridge National Laboratory in 1943 is quoted as saying:
>
> > 'The aggregate MUF from the three diffusion plants alone is expressible in tons. No one knows where it is. None of it may have been stolen, but the balances don't close... The AEC can say officially that quantities of MUF are not dangerous. That is not so. Tons have been lost. They can say they have impregnable barriers, sensitive modern instruments. Not that impregnable not that sensitive.

> They can say 'The numbers are not good, but we don't know how to do any better.' If you admit that this industry is not controllable, then you shut down. You wait until it is controllable, and then start up.

From July, when the Petition was filed, until now, as many as 18,000 additional deaths may have been irrevocably committed as a result of the Nuclear Regulatory Commission's delay in the face of a showing of an emergency. Such slowness is unacceptable in a society which prizes life highly. As Cardozo said: "Speed too great at other times is proper in emergencies," *In the Matter of Barington v. Yellow Taxi Corp.*, 250 N.Y. 14, 18.

3. The present situation, undisturbed, is a clear violation of the intent of Congress in enacting the Atomic Energy Act and amendments.

This cause arose upon the publication by the Nuclear Regulatory Commission of statements describing the harms which would accrue to petitioner and other persons as a result of the actions of the Commission's licensees. By one of the Commission's officer's admissions, contained in correspondence to petitioner, 400 cancer deaths would eventually occur from the operation of one nuclear reactor for one year. At the present time, the Nuclear Regulatory Commission's licensees operate approximately 70 reactors. By the

above-mentioned calculation, this would represent annually approximately 28,000 eventual deaths from the continued operation at the present level. By another of the Commission's published statements, some 1,000 eventual cancer fatalities and 2,000 eventual fatal birth defects can be expected to result from the continued operations of the Commission's licensees from 1975 to the year 2000, or approximately 120 future deaths annually.

Either there is judicial review of the implicit agency decision, or the Congress must provide another emergency remedy.

Congress may not promulgate a law which does not adequately protect the right to life.

> There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of the legislative authority...
>
> The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right

and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, legislature possesses such powers, if they had not been expressly restrained, would in my opinion, be a political heresy, altogether inadmissible in our free republican governments. *Calder v. Bull* 3 U.S. (3 Dall) 386, 1 L.Ed. 648 (1798).

4. The petitioner has a right to personal security which the United States is violating.

The right of the people to be secure in their persons is defined (by a legal encyclopedia) in this way:

Rights included in personal security.

The right to personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. It includes the right to exist, and the right to enjoyment of life while existing, and it is invaded not only by a deprivation of life but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual. . .legislation or acts in violation of the constitutional guarantee of personal security are null and void. 16 *Corpus Juris Secundum*, Con. Law § 205a.

In the present case, the personal security of the petitioner which the Nuclear Regulatory Commission is violating by its continuing course of conduct unrestrained falls within the protections secured by the Constitution. There is no assurance that petitioner's life will not be among those lost from the continued operation of the nuclear fuel cycle under the NRC's license. Yet, under the Fourth and Fifth Amendments to the Constitution, this guarantee against unwarranted intrusion must be provided by every federal agent to every citizen.

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts; and these fundamental rights may not be submitted to vote and do not depend on the outcome of an election...

The fundamental rights protected by the constitutional guarantees may not be transgressed with impunity or be disregarded because of expediency, neither may they be abridged or suspended, even for a single moment, except in the manner and under the circumstances especially provided by the law. 16 *Corpus Juris Secundum*, Constitutional Law § 199(2), Natural Rights.

Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution. *Wilson v. New*, 243 U.S.

332, 372, 37 S.Ct. 298, 61 L.Ed. 755.

> There are limitations upon the powers of governments, without any express designation of them in their organic law; limitations which inhere in their very nature and structure. *U.S. v. Erie Ry.*, 106 U.S. 327, 334, 1 S.Ct. 293, 27 L.Ed. 162.

> A man may not barter away his life or his freedom, or his substantial rights. *Home Ins. Co. v. Morse*, 20 Wall (87 U.S.) 445, 451 22 L.Ed. 365.

The crux of the federal questions raised in this action are whether any agency of the United States may damage or cause the death of any person, knowingly and intentionally, without due process. While figures as to the magnitude of the crime vary, the facts are undisputed: The radiation released under federal license, sponsorship, and active promotion is killing and will continue to kill human beings. United States citizens will die. Citizens of foreign nations will die. Yet the words of the Constitution are clear:

> *Amendment IV. The right of the people to be secure in their persons ... shall not be violated.*

> *Amendment V. No person shall be ... deprived of life ... without due process of law.*

Petitioner is possessed of rights which neither she, nor anyone else on her behalf has given the United

States the power to take from her.

> *Amendment IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.*

5. The petitioner must be allowed reasonable access to the courts if her life and health are subject to forfeiture.

If emergency relief is requested, the Court of Appeals can only defer to the Commission's discretion and greater expertise on such questions of "interim relief" when it appears from the whole case and the reasons stated that the agency action is supported by reason. *Nader v. N.R.C.*,168 U.S. App. D.C. 255, 513 F.2d. 1045, at 1050 (1975). To determine this, the Commission's decision is reviewable for abuse of discretion. *Nader v. N.R.C. supra* at 1048; *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 588 (1974).

The Court has an obligation to ensure that the administrator has made a reasoned decision which conforms to the legislative language and purpose. *Wellford v. Ruckelshaus*, 142 U.S. App. D.C. 88, 91, 439 F.2d 598, 599 (1975).

The only mechanism available to determine whether the determination is supported by reason is judicial review. It is not the court's place here to defer to scientific expertise; it is for the court to determine whether indeed the determination that no emergency existed was supported by reason.

> The balancing of health consideration against other societal benefits is not an appropriate responsibility for the scientific community, which by training, and perhaps inclination, has little special competence for evaluating societal benefits. Technical judgments on risk should be separated from societal and political judgments concerning benefits, so that decisions can be made on the basis of visible preferences. *Origins of Human Cancer.* "Estimates of the Cancer Risk Due to Nuclear Electric Power Generation," W. H. M. Ellett & A. C. B. Richardson, Office of Radiation Programs, EPA, 1977, p. 526.

This viewpoint is further supported by the decision of this Court in *Crowell v. Benson*, which held that access must remain open to the courts for the determination (1) of questions of law, and (2) of those facts which are

> fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme. *Crowell v. Benson*, 285 U.S. 22, at 54.

> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. ...It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency...for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under a Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law. *Ibid.*, at 56-57.

Petitioner is one person injured by the acts of the Nuclear Regulatory Commission's licensees. Whether or not she will be one of those to die or to suffer other effects cannot now be shown by any artifact of science, but the physical intrusions which cause the acknowledged harms can be shown to be also intruding upon the body of the petitioner. Petitioner has fundamental rights that she enjoys to self-preservation, freedom from harm, and peace of mind.

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government—especially any free government existing under a written constitution—to interfere with the exercise of that will.

It is the will of the petitioner, as a human being, that she not be subjected to the physical abuse and threat of

death at the hands of the Nuclear Regulatory Commission, and that the rights of other humans, here and abroad, and of those yet unborn in the millennia to come, and of all God's creation, be preserved.

The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives injury. *Baker v. Carr*, 369 U.S. 168, 82 S.Ct. 691, 7 L.Ed. 2d 663.

> I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others. I have always supposed that the right to take all measures for the support of life, which are innocent in themselves, is an element of that freedom which every American citizen claims as his birthright. *Powell v. Pennsylvania*, 127 U.S. 678, 682, 8 S.Ct. 992, 1257, 32 L.Ed. 253.

The Constitution secures, as against the government, the fundamental rights to breathe unpoisoned air, drink unpoisoned water, till unpoisoned soil, grow unpoisoned food, procreate undamaged children, and nurture them in a safe environment. To allow the Nuclear Regulatory Commission to continue in this present course of conduct unrestrained would most certainly, by their own admissions, result in loss of life to a number of human beings. Moreover, the reasonable possibility exists that one of those damaged will be the petitioner or her descendants, for whom no remedy apart from an immediate injunction can offer full protection.

> Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. *Slaughter House Cases*, 16 Wall (83 U.S.) 36, 127.

> From the point of view of the world the end of life is life. Life is action, the use of one's powers. And to use them to their height is our joy and duty, so it is the one end that justifies itself. *Speeches*, Oliver Wendell Holmes, 85.

The Court of Appeals must hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority or limitations, or short of statutory right. 5 U.S.C. § 706 (2)(A)(B)(C).

> When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path. *Anti-Fascist Ref. Comm. v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of

> their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. *Olmstead v. U.S.*, 71 S.Ct. 624, 341 U.S. 123, 177, 95 L.Ed. 817

Petitioner's cause is one which is long overdue, and might be longer still in achieving the redress of grievances sought, were any other other branch of government relied upon for a remedy. The power of the court in this case is one of speed, and of justice to the individual. In this sensitive area, the Judiciary is the standard-bearer of the Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals of the District of Columbia.

Respectfully submitted,

(s) Joel Kachinsky
Joel Kachinsky
Counsel for Petitioner

February 1, 1979

I certify that 3 printed copies of this petition were served on February 2, 1979, to Stephen Eilperin, Attorney for the Nuclear Regulatory Commission, and to the Office of the Solicitor General of the United States.

(s) Joel Kachinsky
Joel Kachinsky
Counsel for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2137

JEANNINE HONICKER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Nuclear Regulatory Commission

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Filed December 21, 1978

Joel Kachinsky, for petitioner.

Stephen F. Eilperin and *E. Leo Slaggie*, for respondent.

Before: WRIGHT,* *Chief Judge*, TAMM and MACKINNON, *Circuit Judges*

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* Chief Judge Wright did not participate in the decision.

Opinion Per Curiam

PER CURIAM: Jeannine Honicker petitioned for review of the Nuclear Regulatory Commission's denial of her emergency petition to shutdown nuclear power plants througout the country and moves for expedited consideration of her petition. We grant the motion for expedited consideration and dismiss for lack of jurisdiction because the Commission's action is not a reviewable "final order."

I

On July 29, 1978, petitioner filed with the Commission the emergency petition at issue here.[1] On September 7, 1978 the Commission replied with a letter explaining that the technical complexity of the issues raised by the emergency petition requires staff analysis and response before a decision can be made. In concluding, the Commission stated: "[i]n view of its intention to address the matter expeditiously, and the lack of a clear demonstration of need for emergency action, the Commission determined that such action was not warranted at this time."[2]

Petitioner considered the Commission's September 7th letter as a "final agency decision"[3] appealable to this Court, and on November 6, 1978 she filed this petition for review. Petitioner charges that the Commission has denied her due process and breached a "non-discretionary

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[1] The emergency petition sought "to compel the Nuclear Regulatory Commission to cease operation of all parts of the nuclear fuel cycle except those involving isolation of hazards from the biosphere, to undertake all measures necessary to prevent or lessen the impact of emergency conditions already created, and to begin emergency and remedial action within 30 days." Petitioner's emergency petition, 1.

[2] Letter from Commission to Jeannine Honicker, September 7, 1978, 2.

[3] Petition to Review 4.

duty to license the handling of radioactive poisons in such a manner that they would not inflict involuntary harm." [4] The relief sought is (1) reversal of the "final order" of the Commission and (2) a temporary restraining order directing the Commission to stop operation of nuclear power plants pending the Commission's decision on her emergency petition. We hold that the Commission's letter is not a reviewable "final order."

II

The pertinent judicial review statutes, 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239(b), provide for judicial review of "final orders" of the Atomic Energy Commission [5] relating to activities of licensees. A "final order" is one that imposes an obilgation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process. *Illinois Citizens Committee v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975); *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 128 U.S. App. D.C. 185, 385 F.2d 967, 968 (1967).

In this case, petitioner points to no statutory or regulatory authority, and apparently there is none, giving her a right to file an emergency petition for direct and immediate action by the Commission. There is a procedure which provides for citizens to file enforcement requests with the Commission, whereupon the Commission may then decide to institute a proceeding to modify, suspend, or revoke licenses.[6] Theoretically, the Commission may

[4] *Id.* at 11.

[5] The Atomic Energy Commission was abolished and its functions transferred to various divisions of the Department of Energy, including the Nuclear Regulatory Commission.

[6] Section 2.206(a) provides that: "[a]ny person may file a request . . . to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for such other action as may be proper." 10 C.F.R. § 2.206.

Section 2.204 provides that: "[t]he Commission may modify a license by issuing an amendment on notice to the licensee that he may demand a hearing . . . . When the Commission finds that the public health, safety, or interest so requires, the order may be made effective immediately." 10 C.F.R. § 2.204.

also, as it implies it has done here, voluntarily consider an enforcement request as one for direct, immediate action under the Commission's supervisory authority. However, there is no statutory or regulatory scheme obligating the Commission to do so. Thus, the Commission's September 7th letter denying the emergency petition was not a final order or final agency action within the meaning of the review statutes, 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239.

Here, the Commission, which is experienced in analyzing and weighing information and data of the kind presented in petitioner's emergency petition,[7] has decided that, though the emergency petition does not warrant emergency action, the issues raised do demand further study and analysis. The administrative process is not completed, and there is no record or final determination of the substantive issues for reviewable appeal. The only issue which has been decided is the question of whether the petition raised concerns which necessitated emergency relief. In denying petitioner's request for emergency relief, the Commission has not denied petitioner any cognizable legal right. Moreover, even if such emergency relief were part of the applicable statutory or regulatory scheme, the appropriate disposition of this appeal would be to defer to the Commission's discretion and greater

[7] The emergency petition is a 152 page printed work containing numerous charts, discussion, and analysis of scientific data, in addition to a statement of law.

expertise on such questions of "interim relief." *Nader v. Nuclear Regulatory Commission*, 168 U.S.App.D.C. 255, 513 F.2d 1045, 1055 (1975). We therefore dismiss the petition.

Judgment accordingly.

Chief Judge Wright did not participate in the decision.

APPENDIX B

7590-01

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

August 30, 1978

Ms. Jeannine Honicker
362 Binkley Drive
Nashville, Tennessee 37211

Dear Ms. Honicker:

On August 9, 1978, the Secretary of the Commission referred your petition of July 29, 1978 to the staff. Your petition requested that the Commission revoke the licenses of all nuclear fuel cycle facilities over which it has jurisdiction, decommission and dismantle such facilities, isolate hazardous radioactive materials from the biosphere, and take other appropriate measures. Your request is being treated under 10 CFR § 2.206 of the Commission's regulations. In accordance with the procedures in that section appropriate action will be taken on your petition within a reasonable time.

A copy of the Notice that is being filed with the Office of the Federal Register for publication is enclosed for your information.

Sincerely,
(s) Harold R. Denton
Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosure:
Copy of Federal Register
Notice

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PETITION FOR EMERGENCY
AND REMEDIAL ACTION
REQUEST FOR ACTION PURSUANT TO
10 CFR § 2.206

Notice is hereby given that by petition dated July 29, 1978, Jeannine Honicker of Nashville, Tennessee, requested, pursuant to 10 CFR § 2.206 of the Commission's regulations, that the NRC take certain emergency and remedial action with respect to operation of the nuclear fuel cycle. Petitioner alleges that continued operation of the nuclear fuel cycle endangers public health and safety in contravention of principles of international law, the United States Constitution, and the NRC's responsibilities under the Atomic Energy Act. Petitioner requests, *inter alia*, that the NRC revoke licenses of all nuclear fuel cycle facilities over which it has jurisdiction, order the decommissioning and dismantling of all existing facilities which handle fuel cycle materials and isolate all hazardous radioactive materials from the biosphere. In accordance with 10 CFR § 2.206, appropriate action will be taken on this request within a reasonable time.

A copy of the petition is available for inspection in the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

(s) Harold R. Denton
Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 30th day of August, 1978.

APPENDIX C

Office of the Secretary
United States
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

September 7, 1978

Ms. Jeannine Honicker
362 Binkley Drive
Nashville, Tennessee 37211

Dear Ms. Honicker:

This is in response to your telegram received late Tuesday concerning your "Petition for Emergency and Remedial Action." The Director of the Office of Nuclear Reactor Regulation wrote to you on August 30, 1978, stating that your petition "is being treated under 10 CFR 2.206 of the Commission's regulations" and that "appropriate action will be taken on your petition within a reasonable time." Requests for enforcement action are normally referred to the directors of the cognizant staff offices who, in turn, routinely treat them as being filed under section 2.206 for the purpose of soliciting public comment and initiating consideration by their technical staffs. In your telegram, you objected to the Commission's taking your petition under section 2.206 of its regulations, but not under section 2.204, and stated your intention to seek judicial relief in that regard.

The Commission met on Tuesday before receiving your telegram to consider, from a procedural stand-

point. how your petition should be addressed. Please rest assured that the Commission will take into account the request at page 3 of your petition that it exercise its inherent supervisory authority in this case, and of your expressed concern that the directors of the cognizant staff offices may not have sufficient authority to order the emergency relief requested. Because of the complex technical issues your petition seeks to raise, the Commission concluded that it was necessary to obtain the views and recommendations of its technical staff before taking any further action. Accordingly, the Commission decided that your petition should be treated as an enforcement petition filed under section 2.206 for the time being, for the purpose of obtaining a staff response. The staff has been directed to prepare its response by the middle of October. At that time, the Commission will review the results pursuant to all of the sections under which your petition was filed. The Commission will then decide whether your petition should be treated as an enforcement request under section 2.206—which contemplates an initial staff decision with the possibility of Commission review—or whether the Commission itself should address directly some or all of the issues you seek to raise, either under other provisions of its rules or pursuant to its inherent supervisory authority over all matters within its jurisdiction. Thus the Commission has explicitly considered your request for direct Commission action and is holding open the possibility that such action may be taken.

The Commission also considered whether any emergency action was warranted pending the receipt of

staff views and recommendations. In view of its intention to address the matter expeditiously, and the lack of a clear demonstration of need for emergency action, the Commission determined that such action was not warranted at this time.

Sincerely,
(s) Samuel J. Chilk
Secretary

APPENDIX D

Office of the Secretary
United States
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

December 6, 1978

Ms. Jeannine Honicker
362 Binkley Drive
Nashville, Tennessee 37211

Dear Ms. Honicker:

This letter is to keep you informed of the Commission's actions with regard to your "Petition for Emergency and Remedial Action." Our previous letter of September 8, 1978 noted that the Commission wished to receive the technical staff's view and recommendations before deciding whether to treat your petition as 10 CFR 2.206 enforcement request or to address directly some or all of the issues which the petition raises.

The Commission has now received a written response (SECY-78-560, copy enclosed) and an oral briefing from the NRC staff regarding your petition. The Commission has concluded that the petition constitutes primarily a challenge to the adequacy of the Commission's regulations and licensing standards and should therefore be addressed by the Commission itself, consistent with 10 CFR 2.802 and the Commission's general supervisory powers.

The Commission has also reaffirmed its earlier decision that no clear need has been demonstrated for emergency relief, pending full consideration and disposition of your petition. The Commission notes that your claim that a large number of deaths will result from each day's operation of the nuclear fuel cycle rests primarily on the assertion that radon releases associated with uranium mill tailings will cause deaths among generations far in the future. The NRC has been considering what significance should be attached to these radon releases. The Commission has previously determined that an immediate shutdown of nuclear plants is not required while the radon releases associated with uranium mill tailings are under consideration. A copy of the Commission decision on that matter is enclosed.

Second, with regard to radiation health effects from fuel cycle emissions other than radon, the cumulative risks over the relatively short period before a decision on your petition can be reached should be small. The licenses which you ask the Commission to revoke were issued after careful consideration of the health and environmental impacts as well as the need for the activity being licensed. The significance and interpretation of much of the data on which you rely are presently the subject of considerable controversy within the scientific community. Thus, the Commission has determined that these licenses should not be summarily revoked pending full review of the issues you raise. The NRC staff's position on emergency and remedial action is enclosed. If you wish to comment on that analysis, the Commission will consider any response from you received by January 8, 1979.

The Commission is also committed to an extensive proceeding to analyze and review the health effects of low-level radiation as related to our current occupational exposure standards. We invite your participation in that proceeding and, if you wish, will see that you receive the relevant materials. For your information, the staff analysis on this matter is enclosed.

You will be notified promptly when the Commission has made a final decision on the merits of your petition.

Sincerely,
(s) Samuel J. Chilk,
Secretary

Enclosures:
1. SECY-78-560
2. 43 F.R. 15613, April 14, 1978
   10 CFR, Part 51
3. SECY-78-415

APPENDIX E

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be held to answer for capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Constitution of the United States, Amendment IX:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

APPENDIX F

5 U.S.C. § 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

28 U.S.C. § 1254. Court of appeals: certiorari: appeal: certified question

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1331. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 2342. Jurisdiction of court of appeals.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2011. Declaration

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. §2012 Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes

are vital to the common defense and security.

(b) Repealed.

(c) The processing and utilization of source, by-products, and special nuclear material affects interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, by-product, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source of special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interests of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2233. Terms of Licenses

Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of this chapter, including the following provisions:

(a) Repealed.

(b) No right to the special nuclear materials shall be conferred by the license except as defined by the license.

(c) Neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter.

(d) Every license issued under this chapter shall be subject to the right of recapture or control reserved by Section 2138 of this title, and to all of the other provisions of this chapter, now or hereafter in effect and to all valid rules and regulations of the Commission.

42 U.S.C. § 2236. Revocation of licenses--False applications; failure of performance.

(a) Any license may be revoked for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commision to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

Procedure

(b) The Commission shall follow the provisions of Section 9 (b) of the Administrative Procedure Act in revoking any license.

Repossession of material

(c) Upon revocation of the license, the Commission may immediately retake possession of all special nuclear material held by the licensee. In cases found by the Commission to forsee to be of extreme importance to the national defense and security or to the health and safety of the public, the Commission may recapture any special nuclear material held by the licensee or may enter upon and operate the facility prior to any of the procedures provided under the Administrative Procedure Act. Just compensation shall be paid for the use of the facility.

42 U.S.C. § 2239. Hearings and judicial review.

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236 (c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the FEDERAL REGISTER, on each application under section 2133 or 2134 (b) of this title for a construction permit for a facility, and on any application under section 2134 (c) of this title for a construction permit for testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in absence of a request therefore by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating

license without a hearing, but upon thirty days notice and publication once in the FEDERAL REGISTER of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

10 C.F.R. § 2.204. The Commission may modify a license by issuing an amendment on notice to the licensee....When the Commission finds that the public health, safety, or interest so requires, the order may be made effective immediately.

10 C.F.R. § 2.206. (a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper.

10 C.F.R. 2.802. Petition for rule making.

Any interested person may petition the Commission to issue, amend, or rescind any regulation. The petition should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section. The petition shall state the substance or text of any proposed regulations or amendment, or shall specify the regulation, the revision or amendment of

which is desired, and shall state the basis for the request. The petition may request the Commission to suspend all or part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rule making. The Secretary will assign a docket number to the petition, deposit a copy in the public document room, and cause notice of the filing of the petition to be published in the FEDERAL REGISTER. Publication will be limited by the requirements of section 181 of the Act and may be limited by order of the Commission. The Director, Division of Rules & Records, Office of Administrator, or his designer, will prepare on a quarterly basis a summary of petitions for rule making pending before the Commission, including the status thereof. A copy of the report will be available for public inspection and copy in the Commission's Public Document Room, 1717 H Street. N.W., Washington, D.C.

10 C.F.R. § 50.100. A license or construction permit may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application for license or in the supplemental or other statement of fact required of the applicant, or because of conditions revealed by the application for license or statement of fact or any report, record, inspection, or other means, which would warrant the Commission to refuse to grant a license on an original application....or for violation of, or failure to observe, any of the terms and provisions of the act, regulations, license, permit, or order of the Commission.

10 C.F.R. § 50.54. Whether stated therein or not, the following shall be deemed conditions in every license issued:

(e) The license shall be subject to revocation, suspension, modification, or amendment for cause as provided in the act and regulations, in accordance with the procedures provided by the act and regulations.